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Nos. 03-838 and 03-849

In the Supreme Court of the United States

STEPHEN E. THOMPSON, ADMINISTRATOR FOR THE ESTATE OF CHANEL ANDRADE, ET AL., PETITIONERS

v.

PHILLIP J. CHOJNACKI, ET AL.

DEBBORAH BROWN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge was required to disqualify himself from this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-34a) is reported at 338 F.3d 448.[1] The opinion of the district court denying petitioners' second recusal motion (Pet. App. 35a-56a) is reported at 116 F. Supp. 2d 778. An earlier opinion denying petitioners' recusal motions (Pet. App. 57a-73a) is unreported.

[1] Unless otherwise indicated, references to "Pet. App." are to the Appendix to the petition for certiorari in No. 03-838.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2003. A petition for rehearing was denied on August 27, 2003. The petitions for a writ of certiorari were filed on December 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a 1993 gun battle and standoff between federal officials and members of the Branch Davidian religious group in Waco, Texas. The incident resulted in the deaths of numerous individuals, who perished when certain Davidians set fire to their compound rather than yielding to lawful authority. Pet. App. 41a-48a. Petitioners are two separate groups of surviving Davidians and the relatives and estates of deceased Davidians, who have been separately represented at all relevant times in this case. Petitioners brought suits for damages against the United States and individual federal and state officials, alleging claims under the Constitution, Texas law, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*, and other federal statutes. Pet. App. 13a.

Petitioners' claims were consolidated for trial before Judge Walter Smith, the only federal district court judge in Waco. Pet. App. 14a. Petitioners moved to recuse Judge Smith from this case, arguing primarily that his rulings and comments in prior civil and criminal cases involving the incidents at issue in this suit demonstrated that he was biased against Davidians generally and had "prejudged" the facts of this case. Judge Smith denied the recusal motion, *id.* at 57a-73a, and the court of appeals denied petitions for a writ of mandamus seeking Judge Smith's recusal or transfer to a different venue, see *id.* at 14a.

On July 1, 1999, Judge Smith dismissed petitioners' constitutional claims against all but one of the individual defendants and held that the discretionary function exception to the FTCA precluded most of plaintiffs' negligence claims against the United States. See *Andrade* v. *Chojnacki*, 65 F. Supp. 2d 431 (W.D. Tex. 1999). After allowing discovery on the remaining issues, Judge Smith empaneled an advisory jury. Trial on the remaining FTCA claims was held from June 19 through July 14, 2000. Pet. App. 15a.

The advisory jury found that the United States had not acted negligently in any respect, and Judge Smith subsequently issued findings of fact and conclusions of law rejecting petitioners' claims in their entirety. Pet. App. 35a-56a. In that ruling, Judge Smith also denied a second motion for recusal filed by petitioners, explaining that none of their allegations of improper conduct "either singularly or combined, forms a legal basis for recusal." *Id.* at 36a. Both the *Andrade* and *Brown* petitioners appealed the final judgment in favor of the government.

2. On appeal, petitioners did not challenge any of the district court's rulings on the merits. Instead, as the court of appeals emphasized at the beginning of its opinion, their "only serious contention is that Judge Smith—on account of his relationships with defendants, defense counsel, and court staff; prior judicial determinations; and comments during [the] trial—should have recused himself from hearing their claims." Pet. App. 13a. The court of appeals rejected petitioners' arguments in their entirety, holding that their "allegations do not reflect conduct that would cause a reasonable observer to question Judge Smith's partiality." *Ibid.*

The court of appeals began its analysis with a discussion of general recusal principles. Pet. App. 16a-19a. Among other things, the court emphasized that the standard for whether a judge's impartiality might reasonably be questioned is objective rather than subjective; that review under

that standard "should entail a careful consideration of context, that is, the entire course of judicial proceedings, rather than isolated incidents"; and that recusal is generally not required unless events during the trial or opinions expressed by the judge are based on an "extrajudicial" source. *Id.* at 17a-18a. In light of those principles, the court stated that petitioners were required to clear a number of "hurdles" to obtain Judge Smith's recusal: "They must (1) demonstrate that the alleged comment, action, or circumstance was of 'extrajudicial' origin, (2) place the offending event into the context of the entire trial, and (3) do so by an 'objective' observer's standard." *Id.* at 18a-19a. Because petitioners were also required to "demonstrate that the district court's refusal to recuse was not merely erroneous, but, rather, an abuse of discretion," the court of appeals concluded that it was "hardly surprising" that they failed to clear those hurdles. *Id.* at 19a.

a. Turning to the separate allegations of "extrajudicial" bias,[2] the court stated that two of the events "may be dismissed without exhaustive consideration" because "[o]ne is trivial," and "the second moot." Pet. App. 19a.

First, the court rejected petitioners' argument that government counsel created an appearance of impropriety by giving food and T-shirts to certain employees in the marshal's and court reporter's office during the trial. Citing Judge Smith's uncontested factual findings that the gift of T-shirts was a "prank," and that "none of the recipients were 'members of the Court's staff,'" the court of appeals stated: "[W]e fail to see how these small courtesies to the court's non-judicial staff could be viewed by any 'objective' observer as compromising Judge Smith's independence." Pet. App. 19a-20a.

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[2] The court noted that several of the events could "more appropriately be characterized as having occurred during the judicial proceedings," but "for simplicity" the court accepted petitioners' characterization of the events as extrajudicial. Pet. App. 19a n.2.

Second, the court rejected the claim "that Judge Smith's longstanding relationships with two of the dismissed defendants, William Sessions and William Johnston," which consisted of Johnston's frequent appearances before Judge Smith and Sessions' service from 1983-1987 on the district court bench with Judge Smith, created any appearance of impropriety. Pet. App. 20a. Because "both Sessions and Johnston were dismissed from the case in July 1999," the court held that this issue was moot, and noted further that "[i]n any event, no facts are proven to suggest that either prior relationship evinces characteristics that would even suggest, much less mandate recusal." *Ibid.*[3]

The court next concluded that, when properly viewed in context, one comment Judge Smith allegedly made during trial—that he had not read certain evidence relating to one of petitioners' claims—was "unproblematic." Pet. App. 20a-21a. The court explained that the evidence the district court allegedly ignored was designed to support an argument that the FBI negligently failed to develop a plan to extinguish fire at the Davidians' compound—an argument that was "almost surely barred from consideration" under the discretionary function exception to the FTCA. *Id.* at 21a. "[B]ecause the applicability of the discretionary function exception does not turn on evidence of the actual decisions made by the defendants, but, rather, on whether the decision is or is not 'susceptible to policy analysis,'" the court of appeals stated that "Judge Smith had no need to examine the evidence supporting this claim." *Ibid.* (citations omitted). As a result, the court of appeals concluded, "Judge Smith's preference not to read the evidence—and

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[3] On a related matter, the court held that Judge Smith's expressions of support for Johnston during an investigation of Johnston in September 2000 were "irrelevant" to petitioners' recusal arguments because "Johnston had been dismissed from this case in July 1999—15 months before this incident occurred." Pet. App. 23a.

his declaration—cannot constitute evidence of bias or even the appearance of such." *Id.* at 21a-22a.[4]

Likewise, the court of appeals held "unproblematic," Pet. App. 20a, Judge Smith's comment that he would be willing to disregard the advisory jury's verdict. The court noted that, although Judge Smith had granted petitioners' request for an advisory jury (over the government's objection), "the FTCA does not grant plaintiffs the right to a jury trial." *Id.* at 22a. Accordingly, the court concluded, Judge Smith's "statement accurately, if bluntly, reflected the status of the advisory jury verdict." *Ibid.*

The court next rejected allegations that Judge Smith's alleged compliment to James Touhey on what petitioners characterized as a "particularly vicious cross-examination of Davidian witness Clive Doyle" demonstrated impermissible bias. Pet. App. 23a. Noting that remarks hostile to counsel or parties almost never provide a basis for recusal, the court emphasized that such comments must be evaluated with reference to objective standards rather than those of a "hypersensitive, cynical and suspicious person." *Id.* at 24a. The court concluded that it "sees a compliment, not a subliminal message of wrongful bias," in Judge Smith's comment. *Ibid.* (internal citations omitted).

Finally, the court of appeals rejected petitioners' arguments that certain comments attributed to Judge Smith in a newspaper article authored by Lee Hancock provided grounds for recusal. Pet. App. 24a-29a. Because petitioners "never brought this article to the district court's attention," the court concluded that "their fulminations lack record support and context," and held that it "cannot review this claim." *Id.* at 26a. Among other things, the court emphasized that petitioners had an opportunity to

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[4] The court of appeals also noted that petitioners elected not to appeal the district court's ruling on the applicability of the discretionary function exception. Pet. App. 22a.

supplement the district court record and bring the article to Judge Smith's attention but failed to do so. *Id.* at 27a-28a. As a result, the court explained, petitioners' "argument ultimately asks this court to judge the judge based exclusively on the fact of publication of his remarks, without context and without verification of their accuracy." *Id.* at 28a. Under those circumstances, the court held that the "complaint about the newspaper article was not properly preserved for appellate review." *Ibid.*

b. The court of appeals also rejected petitioners' arguments that Judge Smith's recusal was required based upon "eight events that occurred on the record during judicial proceedings." Pet. App. 29a. Citing this Court's decision in *Liteky* v. *United States*, 510 U.S. 540 (1994), the court emphasized that the first six of the events involved "the type of opinions/expressions that *Liteky* holds nearly exempt from causing recusal." Pet. App. 31a. The court also rejected petitioners' contention that "*Liteky* either does not apply or should not apply as rigorously when, as in this FTCA case, the judge is the factfinder." *Id.* at 31a-32a. Noting that "[j]udges often find facts in performing their duties—in admitting evidence, in sentencing criminals, in ruling on motions, as well as in deciding bench-tried cases," the court concluded that "*Liteky* draws no distinction based on the type of proceeding, and none is warranted." *Id.* at 32a.

In addition, the court rejected arguments for recusal based on two other events that petitioners "could have, but did not, appeal." Pet. App. 32a. Because "one of these involves the irrelevant advisory jury and one a grievously late attempt to create a factual record for appeal," the court of appeals concluded that allowing "the judge's demeanor or actions in the two events a significant influence on our recusal decision would be grossly disproportionate to the legal implications of his actions." *Ibid.*

Finally, the court of appeals acknowledged that events in court could, in rare circumstances, "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Pet. App. 32a (quoting *Liteky*, 510 U.S. at 555). However, the court explained, "[a]mong the events cited above, only one—Judge Smith's ill-tempered references to [Branch Davidian witness Livingston] Fagan—even arguably fall[s] within that deplorable range." *Ibid.* Because "those brief comments in the course of a decade of litigation refer only to one witness, not to the Davidians or Appellants in general or to the merits of their case," the court of appeals held that they did not establish bias or partiality warranting recusal.[5] *Ibid.*

ARGUMENT

The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court properly applied established principles for judicial recusal in affirming the district judge's decision not to disqualify himself from this case. Although petitioners seek to re-litigate a host of factual issues relating to recusal, this Court does not normally grant review to revisit consistent factual findings by two lower courts. Moreover, neither of the two legal questions petitioners have identified is squarely presented in this case and neither involves an important question of law on which the courts of appeals are divided. Accordingly, further review is not warranted.

1. a. A federal judge is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). Recusal is also

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[5] The court also held that the *Andrade* petitioners had waived any argument other than recusal by limiting their opening brief to that issue, Pet. App. 33a, and that the *Brown* petitioners had offered no "argument in law for the reversal of the district court's judgment." *Id.* at 34a.

required where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." 28 U.S.C. 455(b)(1). Those statutory provisions are designed to avoid even the appearance of impartiality, and they establish an objective standard requiring recusal where a judge's "impartiality might be reasonably questioned." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988). As this Court has recently cautioned, however, the determination as to whether a judge's partiality might reasonably be questioned requires careful consideration of context and the entire course of judicial proceedings, rather than merely a focus on isolated incidents. See *Sao Paulo State of the Federative Rep. of Brazil* v. *American Tobacco Co.*, 535 U.S. 229, 232-233 (2002).

In addition, it is well-established that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Likewise, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Ibid.* In short, recusal is generally not required unless some "extrajudicial" source of bias has infected the proceedings.

b. The court of appeals correctly applied the foregoing recusal standards in holding that the district judge did not abuse his discretion by declining to disqualify himself from this case. After a careful review of the various incidents alleged to demonstrate both extrajudicial and intrajudicial bias, Pet. App. 19a-32a, the court found no grounds for recusal and concluded that petitioners had waived any arguments on appeal other than recusal. *Id.* at 33a-34a.

The *Andrade* petitioners contend that the decision below "represents an egregious departure from the ac-

cepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." 03-838 Pet. 20. They nowhere identify, however, any way in which the court misstated or misapplied settled recusal standards. Instead, they simply reiterate the same factual arguments that the court of appeals carefully considered and rejected, asserting primarily that Judge Smith's comments and rulings in this case and prior cases demonstrate both intrajudicial and extrajudicial bias warranting recusal.[6]

As recounted above, the court of appeals concluded that none of the alleged incidents identified by petitioners, either by themselves or combined, established any grounds requiring Judge Smith to recuse himself from this case. The fact-bound and record-specific nature of those conclusions confirms that further review by this Court is unwarranted. Indeed, it is well-established that this Court generally will not revisit the "concurrent findings of fact by two courts below." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). See also *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

In any event, petitioners offer no persuasive grounds for second-guessing the court of appeals' determination that recusal was unwarranted in this case. Relying heavily on comments by Judge Smith based on facts and events occurring during these and prior judicial proceedings, the *Andrade* petitioners contend that those comments demonstrate a high degree of antagonism toward them, which made fair judgment impossible. 03-838 Pet. 21-24. As the court of appeals recognized, however, "'expressions of impatience, dissatisfaction, annoyance, and even anger' do not establish bias or partiality." Pet. App. 32a (quoting

[6] Likewise, the *Brown* petitioners repeat the same litany of factual allegations rejected by the court of appeals to support their contention that an objective observer "would entertain reasonable questions about Judge Smith's impartiality in this case." 03-849 Pet. 9-24.

Liteky, 510 U.S. at 555-556). The court correctly concluded that none of those comments, especially when viewed in the context of a decade of contentious litigation, demonstrated impermissible bias requiring recusal.

Petitioners' reliance on several incidents allegedly demonstrating "extrajudicial" bias is equally unavailing. As in the court of appeals, the *Andrade* petitioners contend that Judge Smith's praise for a "particularly vicious cross-examination" conducted by James Touhey, and the provision of small "gifts" to court employees, including U.S. Marshals employed by the Justice Department, created an impermissible appearance of impropriety. 03-838 Pet. 24-29. After placing each of those incidents in the proper context, however, the court of appeals correctly concluded that neither would cause an objective, well-informed observer—as opposed to a "hypersensitive, cynical, and suspicious person"—to question the court's impartiality. Pet. App. 24a. Indeed, as the court of appeals noted, even if the gifts by government attorneys of food and T-shirts to federal marshals and individuals in the clerk's office could somehow be deemed inappropriate, those events were entirely beyond Judge Smith's control and thus could not reasonably "be viewed by any 'objective' observer as compromising Judge Smith's independence." *Id.* at 20a.[7]

2. The *Andrade* petitioners also contend that this case presents two significant legal issues. 03-838 Pet. 7-20. Neither warrants further review.

a. Petitioners argue first that review by this Court is warranted to address what they contend is an unresolved and important question: whether a more stringent stan-

[7] Petitioners' cursory recitation of "other evidence of bias," 03-838 Pet. 29, is simply a list of allegations that the court of appeals exhaustively considered and rejected. Likewise, the various examples of Judge Smith's alleged bias against Davidians offered by the *Brown* petitioners, 03-849 Pet. 9-24, add nothing to the categories of allegations considered and rejected by the court of appeals.

dard for recusal than that employed in *Liteky* applies where the trial judge is also the factfinder in a case. 03-838 Pet. 7-17. Petitioners, however, cite no conflict in the circuits on this question, or even any post-*Liteky* decision suggesting that a more stringent recusal standard is applicable in these circumstances. To the contrary, petitioners concede (*id.* at 9) that the only other post-*Liteky* decision to address the issue, *Bieber* v. *Department of the Army*, 287 F.3d 1358 (Fed. Cir. 2002), reached a conclusion consistent with the court of appeals in this case: that the same standard for recusal "ought to apply regardless of whether the trier of fact is a jury or judge." *Id.* at 1363.

In light of this uniform post-*Liteky* precedent, petitioners criticize both the court of appeals in *Bieber* and the court of appeals in this case for failing adequately to analyze the significance of a judge's role as a factfinder in formulating appropriate recusal standards. The court of appeals, however, fully considered petitioners' argument "that *Liteky* either does not apply or should not apply as rigorously when, as in this FTCA case, the judge is the factfinder" and concluded that there was "no support for this position legally or logically." Pet. App. 31a-32a. Because "[j]udges often find facts in performing their duties—in admitting evidence, in sentencing criminals, in ruling on motions, as well as in deciding bench-tried cases," the court correctly concluded that no different recusal standard was warranted based on the type of proceeding at issue. *Id.* at 32a.

Petitioners offer no compelling rationale for a heightened recusal standard in cases where a judge is also the fact-finder. Nor do they identify any principles to differentiate the circumstances in which their higher standard would apply from those in which the judge is "only" admitting evidence, ruling on motions, or sentencing criminals and in which the *Liteky* standard would presumably continue to govern. Instead, petitioners rely (03-

838 Pet. 10) solely on several pre-*Liteky* decisions suggesting that a "judge's role as trier of fact is a weighty consideration" in the decision whether to recuse. Because those decisions predate *Liteky*, however, they are of minimal instructive value, and they certainly provide no support for petitioners' assertion that "clarification is needed as to whether the *Liteky* standard applies to cases where a judge has predetermined fact issues in prior cases." *Id.* at 13.[8] On that issue, the post-*Liteky* decisions are fully consistent, and review by this Court is therefore not warranted.

b. Finally, the *Andrade* petitioners' contention (03-838 Pet. 17-19) that this Court should grant certiorari to address the question whether harmless error analysis applies to recusal motions filed prior to judgment is also without merit. The applicability of harmless error analysis is not presented in this case, because the court of appeals nowhere found that recusal was warranted but held that Judge Smith's failure to recuse was harmless. To the contrary, the court's sole discussion of "harmless error" was a single reference to that standard in the course of holding that petitioners had waived all claims of error other than recusal. Pet. App. 33a. Thus, regardless of whether some courts of appeals have questioned the applicability of

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[8] Likewise, the *Andrade* petitioners' reliance (03-838 Pet. 13) on a monograph published by the Federal Judicial Center to suggest that there is widespread confusion over the applicable standards for recusal in a bench trial is misplaced. Citing one of the pre-*Liteky* decisions that mentions this issue, *Alexander* v. *Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993), the monograph simply raises the question whether it might be prudent for judges to follow a different recusal standard in a bench trial. Pet. App. 82a. As the next page in the monograph makes clear, however, although at least one post-*Liteky* court has recognized that "recusal might well be prudent when a perjury bench trial involves testimony from a proceeding over which the same judge presided," that court has squarely held that "section 455(a) does not require it." Pet. App. 83a (quoting *United States* v. *Barrett*, 111 F.3d 947, 951 (D.C. Cir.), cert. denied, 522 U.S. 867 (1997).)

harmless error analysis to recusal motions filed prior to judgment, see 03-838 Pet. 18-19, this case does not present a suitable vehicle for addressing that issue.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2004

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[9] Nor is review by this Court warranted to address the two questions other than recusal posed by the *Brown* petitioners: whether petitioners were denied a fair trial, and whether petitioners adequately preserved arguments for reversing the district court's judgment. 03-849 Pet. 24-30. The court of appeals' fact-bound ruling that the *Brown* petitioners had offered "no argument in law for the reversal of the district court's judgment," Pet. App. 34a, was correct and, in any event, provides no grounds for review by this Court.